UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ST. LOUIS CARDINALS, LLC

Case 14-CA-213219

and

JOE BELL, an Individual

RESPONDENT'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S SUPPLEMENTAL DECISION AND ORDER REJECTING SETTLEMENT

/s/ *Robert W. Stewart*_____
Robert W. Stewart
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
7700 Bonhomme Avenue, Suite 650
St. Louis, MO 63105
Telephone: 314.827.3427
Facsimile: 314.802.3936
Robert.Stewart@ogletreedeakins.com

Harrison C. Kuntz
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
7700 Bonhomme Avenue, Suite 650
St. Louis, MO 63105
Telephone: 314.898.4074
Facsimile: 314.802.3936
Harrison.Kuntz@ogletreedeakins.com

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Respondent St. Louis Cardinals, LLC ("Respondent" or "Cardinals"), by its undersigned counsel and pursuant to Rule 102.46 of the Board's Rules and Regulations, respectfully files the following Reply Brief in Support of Exceptions to the Supplemental Decision of Administrative Law Judge ("ALJ") Arthur A. Amchan,[1] and the ALJ's Order Rejecting Settlement.

The defining feature of the General Counsel's Brief lies in what it does *not* say. Throughout its Brief, the General Counsel fails to address the flaws Respondent identified in the ALJ's Supplemental Decision. Instead, it merely reiterates the same erroneous positions advanced by the ALJ. The General Counsel's evasive approach suggests it has not addressed Respondent's points because it cannot credibly do so. To the contrary, the ALJ stretched the bounds of the record and Board law beyond the point of reasonable defense.

[1] References to the ALJ's Supplemental Decision are identified by the letter "D" followed by page and line number, e.g., "D.__:__." References to the hearing transcript are by the letters "Tr.", followed by page and line number, e.g., "Tr. ___:___." References to the General Counsel's Answering Brief are by the letters "GC.Br." followed by page number, e.g., "GC.Br. __". References to Respondent's Brief in Support of Exceptions are by the letters "R.Br." followed by page number, e.g., "R.Br. __".

I. The ALJ's Mere Citation to *Wright Line* Does Not Cure His Rejection of the *Wright Line* Burden-Shifting Framework in Application.

The General Counsel offers only the most conclusory of defenses to the ALJ's persistent refusal to apply a "but for" analysis to Respondent's *Wright Line* rebuttal defense. Respondent's Brief in Support of Exceptions points out that, for example, the ALJ: (1) explicitly calls the Board's application of *Wright Line* into question; (2) refuses to treat the Board's dismissal of an allegation regarding Thomas Maxwell as important to the analysis (or even to accept the validity of the Board's determination); (3) again conflates *prima facie* analysis with rebuttal defense analysis; and (4) improperly treats the rebuttal burden as a question of credibility, rather than a legal issue. R.Br. 3-6. The General Counsel addresses ***none*** of these critical flaws of the ALJ's Supplemental Decision. In fact, it explicitly endorses the ALJ's erroneous treatment of the rebuttal burden as a pure credibility issue by stating on page four of its Brief, "The ALJ correctly did not credit Barrett's testimony that Respondent would have taken the same action against James Maxwell and Kramer absent protected activity[.]"

Instead, the General Counsel's support of the ALJ's analytical framework boils down to one reductive proposition: the ALJ cited *Wright Line* and quoted its language, and so he must have applied *Wright Line* properly. GC.Br. 2-3. This assertion does not follow. Mere recitations of the standard do not cure the ALJ's stubborn refusal to correctly analyze Respondent's rebuttal defense.

The General Counsel has not pointed to any specific correct application of the *Wright Line* rebuttal defense standard by the ALJ, because no such correct application exists. The unrebutted evidence establishes multiple legitimate reasons why, even without their purportedly protected activities, Painting Foreman Patrick Barrett would not have offered Spring 2018 painting work to James Maxwell or Eugene Kramer. The ALJ and the General Counsel cannot overcome those

legitimate reasons by merely citing *Wright Line*, ignoring the factors supporting Respondent's rebuttal defense, and failing to conduct a true "but for" analysis.

II. The Purported Statements of Director of Stadium Operations Hosei Maruyama Do Not Affect the *Wright Line* Rebuttal Defense Analysis of Painting Foreman Barrett's Decisions.

The General Counsel's Brief repeatedly adopts the same fundamental error committed by the ALJ: ignoring the exclusive discretion possessed by Barrett to compile his Spring 2018 painting crew. It argues that Maruyama's purported statement, "actions have consequences" shows Respondent cannot meet its rebuttal burden. GC.Br. 4-5. Maruyama, however, did not make the decisions regarding whom would receive offers of work. To the contrary, the unrebutted evidence demonstrates Barrett, and Barrett alone, possessed full discretion to compile his crew. (Tr. 283:25-284:3, 313:7-15). As Respondent described in its Brief in Support of Exceptions, both Barrett and Maruyama confirmed at hearing, without contradiction, that Barrett possessed this sole discretion, just as prior Painting Foreman Billy Martin possessed the same authority. R.Br. 23-24. Consequently, the alleged statement by Maruyama has no bearing on whether Barrett would have offered work to James Maxwell or Kramer absent their purportedly protected activities. In fact, Barrett's subsequent decision to offer work to Thomas Maxwell clearly demonstrates that the internal Union charges were not the determinative factor in Barrett's hiring decisions for his painting crew in early 2018.

Moreover, the ALJ's reliance on this statement, as supported by the General Counsel, represents yet another misapplication of the *Wright Line* burden-shifting framework. Even assuming *arguendo* that Maruyama's purported statement, of which Barrett was unaware, (i) referred to protected internal Union charges and (ii) could otherwise shed light on Barrett's thought process, such purported comment by Maruyama is relevant only to the *prima facie* stage of the analysis. As the Board's initial Decision here explained, a statement that evinces animus may help

satisfy a *prima facie* burden, but does not contribute to the assessment of whether Barrett would have declined to offer James Maxwell or Kramer work for legitimate reasons.

As a result, the mountain the ALJ and the General Counsel make of the alleged Maruyama statement represents only a molehill in the proper analysis of Respondent's rebuttal defense.

III. Respondent Possessed No Intention or Obligation Regarding Its Painting Crew Members Prior to Selecting Its New Painting Foreman.

Also like the ALJ, the General Counsel asserts Respondent possessed some obligation to offer work to James Maxwell and Kramer based on events that occurred prior to Barrett's appointment as Painting Foreman. GC.Br. 5-6. Even putting aside that this approach lacks consistency with the General Counsel's analysis elsewhere, the record flatly contradicts it.

As noted above, the record leaves no doubt that Barrett, like the Painting Foreman before him, possesses full and exclusive authority to assemble his painting crew. The General Counsel, however, focuses on a background check letter issued to James Maxwell and Kramer, along with all other 2017 employees, ***well prior to Barrett's appointment as Painting Foreman***. GC.Br. 5; (Tr. 313:18-314:16). It then claims, "[i]f Respondent intended to bring in a new crew, it would not have gone through the effort and expense of completing background checks for Kramer and James Maxwell." GC.Br. 5. The General Counsel cites no record evidence in support of this assertion, and none exists. In fact, the Board may reasonably conclude that the "effort and expense" of such background checks was minimal where Respondent undisputedly sent the letters, as a blanket communication, to all 2017 seasonal and part-time employees of Respondent. (Tr. 313:18-314:16).

Respondent's Brief in Support of Exceptions describes, in detail, evidence demonstrating the clean slate Barrett possessed in assembling his Spring 2018 painting crew. R.Br. 23-26. In response, the General Counsel fails to address any of that evidence. Instead, it focuses on the

background check letter, in addition to a purported comment by Barrett that James Maxwell could continue to work for the Cardinals. GC.Br. 5. However, not even the ALJ relied upon this purported hearsay comment described by James Maxwell, which Barrett denied at hearing. (Tr. 326:5-7). Importantly, the General Counsel has not excepted to the ALJ's failure to find this comment occurred, and thus cannot rely upon it now. Moreover, assuming *arguendo* this purported comment was actually made by Barrett, it would have been made before James Maxwell's subsequent undisputed statement in which he adamantly and passionately made clear that he could not work for Barrett.

The General Counsel further relies upon an entirely manufactured story that, after the purportedly protected activities occurred, Barrett "demanded" the authority to hire the painting crew at his discretion. There is no record evidence supporting the claim that Barrett ever made such a "demand," and the General Counsel cites none. The General Counsel's reliance on such a "demand" belies the reality that Barrett, like his predecessor, possessed full authority to hire his crew from the moment he began the Painting Foreman job in January 2018.

As noted in Respondent's Brief in Support of Exceptions, the Board has repeatedly recognized the lawfulness of new supervisors applying their own preferences and practices in cases such as *Wabash Transformer Corp.*, 215 NLRB 546 (1974); *The Trading Port, Inc.*, 224 NLRB 980, 982-83 (1976); and *Service Spring Co.*, 263 NLRB 812, 812-13 (1982). R.Br. 24. Recently, the Board further found an ALJ's failure to recognize the natural consequences of supervisory changes constituted reversible error. *Queen of the Valley Medical Center*, 368 NLRB No. 116 (Nov. 25, 2019) (stating, "the judge failed to give sufficient weight to the facts surrounding [the new supervisor's] decision to reassign [an alleged discriminatee] to a different shift--in particular the fact[] that [the new supervisor] had only recently become the EVS Department director.").

This dynamic applies with even greater force here because the Spring 2018 season represented the first time Barrett ever possessed an opportunity to formulate his crew.

The ALJ and the General Counsel go to great lengths to construct a narrative that Barrett's decision-making authority, as the new Painting Foreman, to hire his own painting crew was constrained by past practices of the prior Painting Foreman, by standard background check form letters sent to all 2017 season and part-time employees and by other factors that had no bearing on Barrett's decision-making authority. These efforts reflect an inability to successfully overcome the legitimate and uncontroverted reasons Barrett chose, in his own discretion, not to offer work to James Maxwell or Kramer. The record does not reflect any constraint on Barrett's decision-making, nor any change of heart by him, and thus the legitimate reasons supporting Respondent's *Wright Line* rebuttal defense must stand.

IV. None of the ALJ's Attacks on the Unrebutted Evidence of Barrett's Legitimate Reasons for Declining to Offer Work to James Maxwell and Kramer Withstand Scrutiny.

The General Counsel similarly fails to address the undisputed evidence Respondent has cited regarding: (1) James Maxwell and Kramer smoking marijuana on lunch breaks; (2) a poor work ethic by James Maxwell; (3) poor work performance by both James Maxwell and Kramer; or (4) James Maxwell stating he could not work for Barrett. Instead, its Brief only reiterates the ALJ's flawed conclusions without addressing the erroneous bases for such conclusions.

First, the General Counsel offers no response to the distinguishing factors between this case and those cited by the ALJ in support of his rejection of uncontradicted evidence. Respondent's Brief in Support of Exceptions describes those factors in detail, applying both the factors of this case and those cited by the ALJ. R.Br. 7-11 (distinguishing *Aero, Inc.*, 237 NLRB 455, fn. 1 (1978); and *Operative Plasterers' & Cement Masons International Association, Local 394 (Burnham Bros., Inc.)*, 207 NLRB 147 (1973)). The General Counsel, in response, merely re-

cites *Aero* and *Burham Bros.*, without elaboration. GC.Br. 6. This approach serves only to highlight the ALJ's erroneous rejection of uncontradicted evidence.

The General Counsel attempts to minimize the importance of the unrebutted evidence by, without any support whatsoever, incorrectly characterizing Barrett's testimony as "full of holes." GC.Br. 4. This mischaracterization is simply not supported by the record. Furthermore, the Board must ask, if the evidence of marijuana use, poor work performance and ethics, and James Maxwell's statements about working for Barrett were not true, why did the General Counsel not put a single witness on the stand to rebut it?

It is also curious that the General Counsel conveniently ignores Kramer's testimony that, prior to Barrett being selected as the new Painter Foreman and prior to the internal Union charges filed against Barrett, Kramer believed that Barrett would not include Kramer on his painting crew if Barrett was selected as Respondent's new Painting Foreman. (Tr. 186:18-21, 188:8-11). Therefore, even prior to the internal Union charges, Kramer knew that Barrett would have other reasons for not wanting Kramer to be part of his new painting crew.

Insofar as the General Counsel's arguments only mirror the ALJ's, Respondent will not belabor their deficiencies here. Of particular note, however, the General Counsel repeatedly emphasizes the purported absence of Barrett's specific reasons for deciding not to offer work to James Maxwell and Kramer from an affidavit. GC.Br. 6, 9. At one point, the General Counsel characterizes the affidavit as taking place during "the underlying investigation[.]" GC.Br. 9. As Respondent explained in its Brief in Support of Exceptions, this characterization is false. Barrett did not provide the affidavit in response to the allegations of this charge. To the contrary, he provided it in support of a charge filed by Respondent against the Union, alleging a violation of Section 8(b)(1)(B) of the Act. (Tr. 367:2-20). Consequently, the reasons Barrett decided not to

offer work to James Maxwell and/or Kramer *were not the subject of that affidavit and were not otherwise necessary for that affidavit*. The affidavit thus referred to these reasons generally as "performance issues," because such a reference sufficed for the purposes of a charge against the Union. (Tr. 324:8-10, 327:7-9, 391:19-392:3).[2]

The General Counsel's cursory treatment of the legitimate reasons for which Barrett did not offer work to James Maxwell or Kramer fails to remedy the underlying errors in the ALJ's Supplemental Decision. The Board must therefore treat the uncontradicted evidence of legitimate reasons for Barrett's decisions as establishing a *Wright Line* rebuttal defense. *West Covina Disposal*, 315 NLRB 47 (1994).

V. A Comment on Eligibility for Re-Hire During an Uncontested Grievance Meeting Does Not Bear on Barrett's Preferences When Exercising His Authority to Hire His Own Painting Crew.

One further instance of the General Counsel's erroneous adoption of the ALJ's logic warrants emphasis. The ALJ argues hearsay evidence that Vice President of Operations Matt Gifford described James Maxwell and Kramer as "eligible for re-hire" during a grievance meeting defeats Respondent's rebuttal defense. D. 5:37-6:3. As explained in Respondent's Brief in Support of Exceptions, this contention lacks merit because the Union did not challenge Barrett's decisions in the grievance meeting, and thus requested no articulation of the reasons for those decisions. R.Br. 8-9. Furthermore, such a statement would not contradict Respondent's rebuttal defense because "eligibility" for re-hire is not the same issue as whether Barrett preferred, for legitimate

[2] Another General Counsel assertion lacking record support requires correction. The General Counsel claims on page eight of its Brief, "[n]one of Kramer's work at the stadium had ever needed to be redone." The record contains no such evidence, and the General Counsel cites none. In fact, Barrett testified specifically, and without contradiction, regarding overall performance issues exhibited by Kramer, both at Respondent's Stadium and elsewhere. (Tr. 295:20-296:14, 326:12-22). Moreover, Shamel Construction owner Bob Shamel corroborated that Barrett observed poor performance by Kramer on a Shamel job. (Tr. 250:24-251:3).

reasons, to select James Maxwell or Kramer for available spots on his Spring 2018 crew. R.Br. 9.

The General Counsel's Brief addresses neither of these points. Instead, it merely re-asserts, without citation to any supportive record evidence (which does not exist), the flawed premise that, "[e]mployees let go due to performance issues or drug abuse are not held out as eligible for rehire." GC.Br. 10. Once again, the General Counsel's Brief holds significance for what it does *not* say. By failing to address facts about the events of the grievance meeting and the nature of "eligibility" for rehire, the General Counsel essentially concedes the deficiencies in the ALJ's logic. This pattern of failure to address the substance of Respondent's arguments, in favor of mechanical support of the ALJ's Decision, serves only to highlight the merit in Respondent's Exceptions.

VI. Contrary to Board Precedent, the ALJ and the General Counsel Have Manufactured a "Compliance Stage" Procedural Standard Regarding Kramer's Ineligibility for Reinstatement.

Footnote 1 of the General Counsel's Brief contains the entirety of its position on the ALJ's refusal to approve the Settlement Agreement regarding Kramer. It states, in conclusory fashion, "Counsel for General Counsel believes the ALJ properly issued his Order and agrees that the proper forum to determine whether Kramer's backpay is tolled is an evidentiary hearing during the compliance stage of these proceedings." GC.Br. 2, n.1. This assertion ignores that the General Counsel freely entered into the Settlement Agreement, and has now apparently altered its position.

Like the ALJ, the General Counsel cites no case law or other authority in support of the proposition that determinations of ineligibility for reinstatement must await the "compliance stage" of proceedings. Indeed, no such authority exists. To the contrary, as Respondent explained in its Brief in Support of Exceptions, Board law consistently reflects consideration of ineligibility for reinstatement alongside substantive merits issues. R.Br. 28 (citing seven cases in which the Board considered ineligibility for reinstatement at the same stage as the underlying merits).

Furthermore, as Respondent demonstrated in its Brief in Support of Exceptions, no need

for an evidentiary hearing exists. R.Br. 26-27. Kramer received more than sufficient notice of the issue of ineligiblity based on his threats, including through a copy of a Federal Protective Services Report detailing the threats, and he received opportunity to respond. Under these circumstances, the ALJ, absent outright dismissal of the Kramer allegation based upon Respondent's *Wright Line* rebuttal defense, should have approved the Settlement Agreement. Instead, he invented, and the General Counsel has now adopted, a novel procedural requirement that ineligiblity for reinstatement determinations must await "compliance proceedings." The Board has not imposed such a requirement in the past, nor should it do so now.

VII. Conclusion

The General Counsel's failure to address the underlying substantive errors in the ALJ's Supplemental Decision speaks volumes. None of its arguments undermine the unrebutted evidence of Barrett's legitimate reasons for declining to offer work to each of James Maxwell and Kramer. These reasons provide ample grounds to conclude that Barrett would not have offered work to either of them even absent purportedly protected activities. As a result, the Board must dismiss the allegations regarding each of James Maxwell and Kramer in their entirety.

Respectfully submitted,

/s/ *Robert W. Stewart*_____

Robert W. Stewart
Harrison C. Kuntz
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
7700 Bonhomme Avenue, Suite 650
St. Louis, MO 63105
Telephone: 314.827.3427
Facsimile: 314.802.3936
Robert.Stewart@ogletreedeakins.com
Harrison.Kuntz@ogletreedeakins.com

ATTORNEYS FOR RESPONDENT
ST. LOUIS CARDINALS, LLC

Dated: July 9, 2020

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of July, 2020 I filed RESPONDENT'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S SUPPLEMENTAL DECISION AND ORDER REJECTING SETTLEMENT via the National Labor Relations Board's E-File system, and serve the same via email, to the following parties:

Joe Bell
1327 Spring Dr.
Herculaneum, MO 63048-1544
joebell4646@gmail.com
Charging Party

William B. Cowan, Acting Regional Director
Lauren M. Fletcher, Field Attorney
National Labor Relations Board
Region 14
1222 Spruce Street, Room 8.302
William.Cowan@nlrb.gov
Lauren.Fletcher@nlrb.gov
Counsel for the General Counsel

s/ Harrison C. Kuntz
Harrison C. Kuntz